NO. 48907-4-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DENNIS J.W. FISHER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLALLAM COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO BRING A MOTION TO SUPPRESS WHERE THE OFFICER UNLAWFULLY EXCEEDED THE SCOPE OF THE OFFICER SAFETY SEARCH WHEN SHE RAISED MR. FISHER'S SHIRT TO SEE INTO HIS POCKETAND THEN REACHED INTO HIS POCKET TO RETRIEVE MONEY AND A SMALL BAGGIE SHE DID NOT REASONABLY BELIEVE WAS A WEAPON.

In his opening brief, appellant, Dennis Fisher, argues that trial counsel was ineffective by failing to move to suppress the evidence obtained as the result of a weapons frisk that exceeded the amount of intrusion permitted under the law because it was not limited to protective purposes. As argued previously, this constitutes manifest error that may be raised for the first time on appeal. In addition, trial counsel provided ineffective representation because the officer exceeded the permissible scope of a protective frisk. In its response, the State argues that the record is insufficient to review the claim of ineffective assistance of counsel regarding counsel's failure to move to suppress the evidence under CrR 3.6. Brief of Respondent at 7.

As argued in the appellant's opening and supplemental briefs, every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment and article I, section 22 of the

Washington Constitution. ***Strickland v. Washington***, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Thomas***, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. ***Strickland***, 466 U.S. at 687; ***Thomas***, 109 Wn.2d at 225-26.

As argued previously, trial counsel was ineffective by failing to challenge the lawfulness of the search of Mr. Fisher's jean's pockets in a motion to suppress. Reversal is required because there is a reasonable probability that a proper challenge to the lawfulness of the scope of the search would have resulted in the motion to suppress being granted and the charge being dismissed.

a. Fisher was prejudiced by counsel's deficient performance because a motion to suppress would likely have been granted

Defense counsel's failure to bring a motion to suppress the cash and heroin obtained during the search must be addressed because ordinarily, the failure to challenge an unlawful search would waive any challenge to the search on appeal. See ***State v. Mierz***, 72 Wn.App. 783, 789, 866 P.2d 65 (1994). However, the Washington State Supreme Court has ruled that an appellant can obtain relief on appeal, where he failed to bring a motion to suppress in the proceedings below, when his

counsel was ineffective in failing to bring a motion to suppress evidence and where there is a reasonable possibility that had counsel brought the motion, the outcome of the proceedings would have been different. ***State v. Reichenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Where the record demonstrates a motion to suppress would likely be granted, the failure to move for suppression is prejudicial. ***State v. Rainey*** 107 Wn. App. 129, 136, 28 P.3d 10 (2001), rev. denied, 145 Wn.2d 1028 (2002). In ***Reichenbach.,*** *supra,* the defendant was charged with possession of methamphetamine after police found the drug inside his car during execution of a search warrant. ***Reichenbach***, 153 Wn.2d at 128-29. Reichenbach's defense attorney failed to move to suppress the drugs "despite serious questions about the validity of the warrant upon which the search was based." ***Reichenbach***, 153 Wn.2d at 131. Specifically, the warrant was invalid at the time of its execution because information from an informant, acquired after the warrant was issued but before its execution, negated probable cause. *Id.*

On appeal, Reichenbach argued his attorney was ineffective for failing to move to suppress the methamphetamine. The Supreme Court agreed. ***Reichenbach***, 153 Wn.2d at 128. The Court noted that lack of probable cause as a basis to suppress the methamphetamine was available to defense counsel at the time of trial. ***Reichenbach***, 153

Wn.2d at 131. Because the bag of methamphetamine "was the most important evidence the State offered[,]" defense counsel's failure to move to suppress it could not be explained as a legitimate strategy. ***Reichenbach***, 153 Wn.2d at 130-31. Because the State would not have been able to prove possession beyond a reasonable doubt without the methamphetamine, defense counsel's deficient performance was prejudicial. Accordingly, the Court reversed Reichenbach's conviction. ***Reichenbach***, 153 Wn.2d at 137.

Similarly to ***Reichenbach***, counsel's failure to bring a motion to suppress the illegal search was prejudicial. The record shows that there was no reasonable trial strategy for not bringing a motion to suppress. Counsel simply neglected to comply with the well-known requirements of CrR 3.6. See ***State v. Kyllo,*** 166 Wn.2d 856,862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); ***State v. Carter***, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect indicates deficient performance. See also ***State v. Tilton***, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (finding failure to present available defense unreasonable).

As in ***Reichenbach***, the question of whether the officer could reach into Mr. Fisher's pocket was the critical issue of the entire case; the possession charge flowed directly from the unlawful search.

Furthermore, there is a reasonable probability that defense counsel's failure to bring a motion to suppress the unlawful search affected the outcome of the case.

As argued in the opening brief, under ***Terry v. Ohio, 392*** U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), a police officer may detain a person on reasonable suspicion that the person may be involved in criminal activity in order to investigate the suspicious behavior. ***Terry***, 392 U.S. at 21. ***Terry*** permits an officer to conduct a limited search for weapons if the officer has reasonable grounds to believe that the person is armed and presently dangerous. ***Terry***, 392 U.S. at 29; ***State v. Hobart***, 94 Wn.2d 437, 441, 617 P.2d 429 (1980).

Under the facts of this case, Mr. Fisher's initial detention occurred following a complaint that to police that Mr. Fisher had kicked in a bedroom door, entered the room and yelled at the occupant and drew back his hand as if he was going to hit that person and then left the residence. Clerks Papers 97 Officer Goode stopped Mr. Fisher's SUV shortly thereafter. The initial stop of the vehicle was justified and therefore not challenged on appeal. Similarly, Mr. Fisher does not challenge the officer's reasonable safety concerns. However, the search of Mr. Fisher by Officer Goode was unlawful because it exceeded the permissible scope of a ***Terry*** pat-down search for weapons. The evidence recovered from

Mr. Fisher as a result of the unlawful search should have been suppressed.

If the contact that results from a standard pat-down search fails to identify an object as a weapon, further intrusive efforts, such as manipulation or removal of the object, are beyond the scope of a ***Terry*** search. ***Hobart***, 94 Wn.2d at 441. Washington courts have held that seizures improperly exceed the scope of a protective weapons frisk when hard but very small items that could not reasonably be suspected of being weapons were pulled from suspects' pockets. In the present case, Officer Goode testified that she saw "a big bulge in the right front pocket of his jeans." RP at 125. She testified that she moved his shirt up and that she was conducting a weapons search. RP at 125. She stated that after lifting his shirt she found a small coin pocket inside the main pocket of his jeans and removed a bad containing a small amount of drugs from that pocket. RP at 125, 133. She did not articulate why she needed to go any further in her search of Mr. Fisher, specifically, why she needed to lift up Mr. Fisher's shirt or go into his coin pocket. The officer expressed no concern that the item might be a weapon. The object removed from Mr. Fisher's pocket was not described in the record as anything other than a baggie which subsequently was determined to contain heroin. R.P. at 168.

Under ***Minnesota v. Dickerson***, 508 U.S. 366, 113 S. Ct. 2130,

124 L. Ed. 2d.338 (1993), lifting Mr. Fisher's shirt to further inspect the bulge and after doing so, to reach into his watch pocket was unlawful. Officer Goode did not have probable cause to believe the object she saw was contraband, nor did she recognize the object that she saw in the pocket as a weapon. In order to fall within the "plain feel" exception, Officer Goode's recognition of the bulge as drugs had to occur immediately upon her initial contact with the object in Mr. Fisher's pocket. ***Dickerson***, 124 L. Ed. 2d at 346. An officer must feel an object "whose contour and mass makes its identity immediately apparent" before the "plain feel" exception applies in the context of a ***Terry*** pat-down. ***Dickerson,*** 124 L. Ed. 2d at 346. There is nothing in this record that suggests officer Goode concluded that the contour and mass of the object in Mr. Fisher's pants appeared to be a weapon. Accordingly, the scope of the protective search exceeded its limitation as a non-evidentiary search for weapons.

b. The record is sufficiently developed for appellate review.

The record is sufficiently developed for this Court to review Mr. Fisher's claim that the search of his person which revealed folded cash and drugs was conducted without authority of law. The fact pattern is not particularly long or complicated; all of the facts pertaining to the seizure

and to the subsequent search were presented at trial. For the reasons stated in the opening and supplemental briefs, Officer Goode's action of lifting his shirt and subsequent search of Mr. Fisher's coin pockets was unlawful and if defense counsel had brought a motion to suppress the evidence obtained, the trial court would have been required to grant it and the outcome of the proceedings would have been different.

The record fully describes the pat down search of Mr. Fisher. This aspect of the initial stop and seizure, and the protective frisk for weapons is not challenged in this appeal. The record is fully developed regarding the search The officer explained in detail the circumstances of the search, her reasons for doing so, the order in which she conducted the search of his person, and the fact that she lifted his shirt during the search and that she ultimately reached into his coin pocket. R.P. at 122, 123-125, 133-134, 141-142, 177, 181-182. What the State argues is a lack of a developed record is more accurately viewed as the State's lamentation that the officer's testimony shows that she reached into his pocket and took out the baggie without a basis to believe that he was armed or that the "bulge" she saw in his pants was a weapon. The questions asked of Officer Goode on direct and cross-examination went directly to the issue of the weapons frisk and pat down search, and particularly relevant to the issue on appeal—the scope of that search. Despite this testimony, the

trial court declined to suppress the unlawful search of Mr. Fisher., not because the record was lacking as to whether such a motion should have been granted, but because defense counsel failed to comply with the procedural requirements of CrR 3.6.

Here, the record regarding the warrantless search of Mr. Fisher's pocket is sufficiently developed to permit this court to review the merits of the issue raised. It is probable that the evidence would have been suppressed had counsel challenged the scope of the search. Without the evidence, the State would not have been able to proceed. If the arguments outlined above are not available on review, then Mr. Fisher was denied the effective assistance of counsel. ***Kyllo***, 166 Wn.2d at 862. His conviction must be reversed and the case dismissed.

2. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state, nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. ***State v. Sinclair***, 192 Wn.App.380, 385-394, 367 P.3d 612 (2016) review denied, 185 Wn.2d 1034 (2016).

Appellate costs are "indisputably" discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in ***Blazina*** apply with equal force to this court's discretionary decisions on appellate costs. ***State v. Blazina***, 182 Wn.2d827, 344 P.3d 680 (2015). Furthermore, "[t]he future availability of a remission hearing in a trial court cannot displace [the Court of Appeals' obligation to exercise discretion when properly requested to do so." ***Sinclair***, 192 Wn.App.at 388. Mr. Fisher has been convicted of a felony. The trial court determined that he is indigent for purposes of this appeal on April 25, 2016. There is no reason to believe that status will change. The ***Blazina*** court indicated that courts should "seriously question" the ability of a person, who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.*at 839

If the State substantially prevails on this appeal, this Court should exercise its discretion to deny any appellate costs requested.

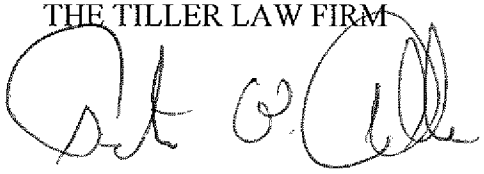
C. CONCLUSION

Mr. Fisher was prosecuted and convicted based on evidence that was obtained in an unlawful search. Mr. Fisher was denied effective assistance of counsel when his attorney failed to bring a motion to suppress this evidence and seek dismissal of the case. For the reasons stated herein, and in appellant's opening and supplemental briefs, Mr. Fisher respectfully requests this Court to reverse the conviction.

If the State substantially prevails on review, the Court of Appeals should decline to impose appellate costs.

DATED: March 30, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on March 30, 2017, that this Appellant's Reply Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402 and to Jesse Espinoza and a copy was mailed by U.S. mail, postage prepaid, to the appellant Mr. Dennis J.W. Fisher:

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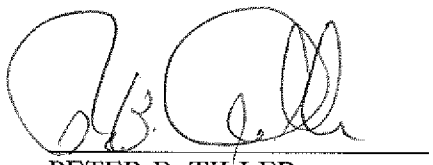
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 30, 2017.



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